No. 10237

In the United States Circuit Court of Appeals for the Ninth Circuit

THE TEXAS COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

ON PETITION TO REVIEW AND ON REQUEST FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

ROBERT B. WATTS,
General Counsel,
ERNEST A. GROSS,
Associate General Counsel,
HOWARD LICHTENSTEIN,
Assistant General Counsel,
DAVID FINDLING,
MALCOLM A. HOFFMANN,
Attorneys,
National Labor Relations Board.

To be argued by:
L. N. D. WELLS, JR.,
Attorney.

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JURISDICTION

This case is before the Court upon petition of The Texas Company to review and set aside an order of the National Labor Relations Board issued against it on July 18, 1942, pursuant to Section 10 (c) of the National Labor Relations Act (49 Stat. 449, 29 U. S. C., Sec. 151, *et seq.*). In its answer to the petition, the Board has requested enforcement of its order. This Court has jurisdiction under Section 10 (e) and (f) of the Act; petitioner, a Delaware corporation, transacts business in the States of Montana, Idaho, and Arizona, within this judicial circuit.

STATEMENT OF THE CASE

This case is now before the Court for a second time. Previously, this case was before the Court on petition of The Texas Company to review and set aside an order of the Board issued against it on January 20, 1940 (R. 134–144). That order was based upon findings that petitioner, by warning its employees against organization in the Union, by threatening to discharge union members, by questioning an employee concerning the identity of union members, and by discharging Clarence Buckless and J. Gordon Rosen because of their union membership and activity, had engaged in unfair labor practices within the meaning of Section 8 (1) and (3) of the Act (R. 81–122). On May 23, 1941, this Court handed down its opinion (120 F. (2d) 186; R. 1725–1739) and entered its decree (R. 1740–1741), remanding the original case, except as to Buckless, to the Board for a redetermination of the issues in the light of the Court's opinion and particularly certain maritime safety statutes to which the Court adverted in its opinion.[1]

[1] The Court denied enforcement of the Board's order insofar as it related to Buckless (R. 1726–1737). Petitioner had itself reinstated Buckless following his discharge but before the Board's order issued, and the Board did not order his reinstatement but only directed petitioner to pay him back pay (R. 120). The Court set aside this portion of the Board's order on the ground that, because of Buckless' "habitual drunkenness" (R. 1727), the order, in its view, was "in derogation of the efficient enforcement of the Congressional maritime safety laws" and would not effectuate the policies of the National Labor Relations Act (R. 1737). One member of the Court concurred specially in the result as to Buckless but would have enforced the remainder of the Board's

Thereafter, the Board issued its order vacating and setting aside its order in the original case (R. 1744–1745), and, following reargument by counsel for petitioner and the Union,[2] reconsidered the case in accord with the opinion of the Court.[3] On July 18, 1942, the Board issued a new decision containing its findings of fact, conclusions of law, and order (R. 1749–1781). The Board membership was partly reconstituted.[4]

Apart from the jurisdictional findings (R. 1756–1758), as to which there is no controversy (R. 163–168) and which were upheld by this Court in the original case (R. 1725), the Board reaffirmed in substance its findings of fact as to petitioner's unfair labor practices described above (except as to Buck-

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order instead of remanding it (R. 1739). The portion of the Board's original decision and order relating to Buckless is not again before the Court. For convenience, unless otherwise specifically indicated, throughout this brief we shall treat the Board's findings and order in the original case as if they omitted the findings and order as to Buckless, thus set aside by the Court.

The original case is known upon the dockets of the Clerk of this Court as Case No. 9518. By stipulation of the parties, approved by a Judge of this Court, the record in the instant case consists of the record in Case No. 9518 and the supplemental proceedings, set forth below, had by the Board pursuant to the remand in that case (R. 1799).

[2] We shall thus refer throughout this brief to the National Maritime Union, which filed the charges initiating this case before the Board. Petitioner also filed a brief with the Board (R. 1756).

[3] The Board did not take further evidence but reconsidered the case upon the evidence taken during the hearing in the original case.

[4] Board Member Leiserson participated in both decisions. He and Chairman Millis, who had been meanwhile appointed, constituted the Board which decided the case on the remand.

less; see note 1, pp. 2–3), and further explicitly found that considerations of maritime safety and discipline and the maritime safety legislation to which the Court had adverted in its opinion afforded no reason for disturbing these findings (R. 1774–1776). The Board's order requires petitioner to cease and desist from its unfair labor practices and, as affirmative action which the Board found would effectuate the policies of the Act, to offer Rosen reinstatement with back pay, and to post appropriate notices on its docks and vessels (R. 1779–1781). It is this new decision and order of the Board which petitioner now seeks to have set aside and which the Board asks to have enforced.

SUMMARY OF ARGUMENT

I. The Board's findings of fact are supported by substantial evidence. Upon the facts so found, petitioner has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (1) and (3) of the Act.

II. The Board's order is valid and proper under the Act.

ARGUMENT

Point I

The Board's findings of fact are supported by substantial evidence. Upon the facts so found, petitioner has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (1) and (3) of the Act

We shall first review the evidence which, we submit, substantially supports the Board's findings of fact in its second decision, as to petitioner's unfair labor practices, in violation of Section 8 (1) and (3)

of the Act. This appears at pp. 5–20, below. We shall then show that neither general considerations of safety and discipline at sea nor the body of marine safety legislation to which this Court adverted in its opinion remanding the case to the Board, subtract from the validity of the Board's findings. This discussion appears at pp. 21–29, *infra*.

A. The Board's findings of fact as to interference, restraint, and coercion are supported by substantial evidence

The Union was formally organized in May 1937 (R. 1608) by dissident (also known as "rank and file") members of the International Seamen's Union (R. 200, 518–519, 1086). The following month J. Gordon Rosen and James Blasingame, both of whom were members of the newly formed organization (R. 200, 518–519), shipped as able-bodied seaman and quartermaster, respectively, on petitioner's vessel, the *California* (R. 199, 517–518). When Rosen reported for duty to Baldwin, acting chief mate of the ship (R. 521), Baldwin admonished him: "There is one thing * * * we don't allow on this ship, and that is getting drunk, missing watches, and we don't allow any agitation with the crew on this union business" (R. 202–203).[5] At about the same time Baldwin likewise warned Blasingame that "There are a few things we don't stand for on here.

[5] In its opinion the Court indicated the view that this remark was prompted by inebriation among the crew of another of petitioner's vessels, the *S. S. Nevada* (R. 1731–1732). The fact is, however, that the warning was issued on the *California*, on which, so far as the record discloses, no conditions of drunkenness existed; moreover the remark was made prior to the voyage of the *Nevada* on which the condition existed (R. 644, 1237–1240).

That is, getting drunk, missing watches and agitating Union to the crew back there. * * * the minute you start out you are finished" (R. 573–574, 521, 204). Rosen testified that several other members of the crew told Rosen that they had also received similar threats and warnings from Baldwin at this time (R. 204).

In July 1937, Baldwin, who was then second mate, and in charge of the midnight to 4 a. m. sea watch to which Blasingame was also detailed, frequently engaged him in conversation during their watches (R. 523, 526, 952, 975). In these conversations Baldwin told Blasingame "how they had been running [the ship] without having any union men aboard" and that he had had to "get rid of" one of the crew "because he was agitating unions all the time" (R. 523). Baldwin also questioned Blasingame as to his union affiliation and that of other members of the crew, including Rosen (R. 523–526, 529), and declared, with reference to one newly hired employee, that he would not be "on this ship very long" if he belonged to the Union (R. 529). On another occasion, upon observing a newly shipped fireman come aboard wearing a Union button, Baldwin remarked, "There is a man who won't ride this ship very long" (R. 529–530). When Rosen was being paid off at the conclusion of the voyage, Baldwin explained to him, "Well, you know we don't want any agitating back there," referring to crew's quarters (R. 221). Blasingame testified that he also was told by Chief Mate David Rosen at the same time, "You can't ride

this ship any more. Go ride one of your rank and file ships" (R. 534–535).

Upon the foregoing facts, the Board's finding that petitioner had interfered with, restrained, and coerced its employees in the exercise of their right to self-organization and collective bargaining, was entirely warranted (R. 1762). Indeed, we submit, it would be difficult to find oral coercion more plainly violative of the right to self-organization than such manifest hostility to union organization as was here displayed, including, as it did, direct threats of discharge for union activity, warnings against union organization, and questioning concerning the union affiliation of employees. See e. g., *N. L. R. B.* v. *Fruehauf Trailer Co.,* 301 U. S. 49, 55; *N. L. R. B.* v. *Friedman-Harry Marks Clothing Co.,* 301 U. S. 58, 75; *N. L. R. B.* v. *Link-Belt Co.,* 311 U. S. 584, 598–599; *N. L. R. B.* v. *Sunshine Mining Co.,* 110 F. (2d) 780, 786 (C. C. A. 9); *N. L. R. B.* v. *Hearst,* 102 F. (2d) 658, 662 (C. C. A. 9); *N. L. R. B.* v. *Schaefer-Hitchcock Co.,* decided November 12, 1942 (C. C. A. 9), 11 L. R. R. 425.[6]

[6] Petitioner's contention that these warnings, threats, and questionings were "nothing more or less than expressions of the opinion" of their makers "regarding unionism" (Brief, pp. 30–31), is frivolous: the utterances and questionings constitute on their face deliberate efforts to obstruct self-organization. Moreover, as this Court recently pointed out, "Even expressions of opinion of such a nature as to intimidate and coerce employees * * * violate the Act." The *Schaefer-Hitchcock Co.* case, *supra.* See, also, *N. L. R. B.* v. *Virginia Electric & Power Co.*, 314 U. S. 469, 477; *International Association of Machinists* v. *N. L. R. B.*, 311 U. S. 72, 80; *N. L. R. B.* v. *Sunshine Mining Co.*, 110 F. (2d) 780, 786 (C. C. A. 9); *N. L. R. B.* v. *Federbush Co.*, 121 F. (2d) 954, 957 (C. C. A. 2).

Petitioner's responsibility under the Act for the activities of Mates Baldwin and Rosen is equally clear. As Second Mate and Chief Mate, respectively, these men were second and third officers in command of the vessel, and each was at times in sole charge of the ship (R. 173–176, 951–954, 1051);[7] their authority over their subordinates, sanctioned by the rigor and law of the sea, is even greater than that of comparable supervisory officials in industrial establishments ashore. Cf. *Virginia Ferry Corp.* v. *N. L. R. B.,* 101 F. (2d) 103, 105–106 (C. C. A. 4). Plainly, they occupied positions sufficient under the controlling decisions to establish petitioner's liability under the Act, whether or not their conduct was within "the scope of their authority or contrary to the desires or instructions" of petitioner. The *Schaefer-Hitchcock* case, *supra;* the *Machinists* case, 311 U. S. 72, 79–80; *N. L. R. B.* v. *Link-Belt Co.,* 311 U. S. 584, 599; *H. J. Heinz Co.* v. *N. L. R. B.,* 311 U. S. 514, 520–521; *N. L. R. B.* v. *Pacific Gas & Electric Co.,* 118 F. (2d) 780, 787 (C. C. A. 9); *Swift & Co.* v. *N. L. R. B.,* 106 F. (2d) 87, 93 (C. C. A. 10); *Consumers Power Co.* v. *N. L. R. B.,* 113 F. (2d) 38, 44 (C. C. A. 6).[8]

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[7] Petitioner ingenuously asserts in its brief (p. 31) that Baldwin was "merely a foreman in charge of the deck crew. He was, therefore, only a supervisory employee."

[8] This disposes, too, of petitioner's suggestion that the anti-union conduct of these supervisors is not attributable to it because such conduct was contrary to its "policy" (Brief, pp. 32–36). Petitioner's responsibility is clear under the foregoing decisions without regard to its "policy"; petitioner was required to make its "policy" effective. While petitioner subsequently posted a notice of "general policy" to its employees on all its ships, containing, *inter alia*, a general assurance that they would not be dis-

B. The Board's findings of fact as to discrimination against Rosen are supported by substantial evidence

The Board found that petitioner twice discharged J. Gordon Rosen because of his union membership and activities: the first time, on April 19, 1938, from the S. S. *Nevada,* on which he reshipped after he left the *California,* and subsequently, on July 14, 1938, from the S. S. *Washington,* on which Rosen shipped after his discharge from the *Nevada* (R. 1768, 1770).[9] The Board's findings of fact in this regard are in each instance supported by substantial evidence.

1. The discharge from the S. S. "Nevada"

We have already referred to Rosen's employment by petitioner on the S. S. *California* (*supra,* p. 5).

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criminated against for union membership (R. 1105–1112), the notice did not purport to advise the employees of their rights under the Act and of petitioner's neutrality. Moreover, as we show below (pp. 9–20), despite its pious declaration, petitioner subsequently discriminated against Rosen because of his union activities. In the circumstances, the notice may not be said to dissipate the coercive effects of petitioner's earlier unfair labor practices, which were never disavowed. Cf. *International Association of Machinists* v. *N. L. R. B.*, 311 U. S. 72, in which the Supreme Court declared (at p. 82), that "it is for the Board * * * to determine how the effect of prior unfair labor practices may be expunged." Cf., also, *F. W. Woolworth Co.* v. *N. L. R. B.*, 121 F. (2d) 658, 661 (C. C. A. 2); *N. L. R. B.* v. *Hawk & Buck Co., Inc.*, 120 F. (2d) 903, 905 (C. C. A. 5); *N. L. R. B.* v. *Kohen-Ligon-Folz, Inc.*, 128 F. (2d) 502 (C. C. A. 5); *Canyon Corp.* v. *N. L. R. B.*, 128 F. (2d) 953, 956 (C. C. A. 8).

[9] The record indicates, as the Board found (R. 1766, note 16) and as petitioner apparently admits (Brief, p. 40), that each of petitioner's ships operates largely as a separate unit insofar as the hiring of unlicensed personnel is concerned, obtaining such personnel from uncoordinated agencies (R. 171–172, 850, 882–883, 962–963).

He had also shipped some 2 years before on petitioner's S. S. *Nevada* (R. 199). On January 10, 1938, several months after leaving the *California,* he was again shipped by petitioner as an able-bodied seaman on the *Nevada* (R. 199, 223). At this time Rosen had had about 10 years' experience as a seaman, of which 6 were as an able-bodied seaman (R. 199). Admittedly, his work theretofore had at all times been highly satisfactory: Mate Tranberg of the *Nevada* testified that he "always thought [Rosen] to be a very good man, a good worker" (R. 1150, 1214). And it was undenied that Rosen's work had been frequently praised and never criticized, that he had been assigned special tasks from time to time, and that when he quit the *Nevada* in 1936, Captain Swanson and Tranberg sought to dissuade him from leaving the ship at that time (R. 216–219, 222–227). In the circumstances, it is not surprising, as Rosen testified, that when he reshipped on the *Nevada* in 1938, the ship's officers were glad to have him back (R. 224–225).

On board the *Nevada,* Rosen immediately assumed leadership of union activities among the crew, all of whom, with one exception, were then members of the Union (R. 228).[10] Thus, Rosen became ship chair-

[10] Organizational and other union activities had to be conducted by the members of the crew without assistance from "outside" Union representatives, because petitioner, as a matter of "policy," refused to permit delegates or other Union agents to board its ships (R. 13). Petitioner also refused to treat with Union representatives in their representative capacity (R. 276, 286, 289–290). Although the Union, by January 1938, had entered into a standard trade agreement with at least eight of petitioner's competitors

man, in which capacity he frequently presided over union meetings which were held in the crew's quarters aboard ship each week (R. 240, 656–657). He was also elected secretary and "special spokesman" for the crew (R. 240), and was a conduit through which union literature and communications were brought aboard ship (R. 228). From time to time, he also acted as representative of the crew in presenting grievances to the ship's officers, including requests for shore leave, bonuses, and overtime pay (R. 230–237, 242–243), and he principally drafted a letter, copies of which the crew sent through the mails and hiring halls to crews of petitioner's other ships (R. 248–252, 255–257), urging them to join the Union and criticizing petitioner for "falling far below the standards" established by the Union on "fully organized ships" (R. 253–255).[11]

On April 18, 1938, when the *Nevada* docked at Port Arthur, Clarence Buckless, another leader in Union affairs on the ship, was discharged by Captain Swanson, master of the vessel (R. 673, 1236). The discharge was regarded by Rosen and the crew generally, all of whom were with one exception members

(R. 1676–1709), and although it was certified by the Board on April 18, 1938, as the exclusive bargaining agency for the unlicensed personnel on all of petitioner's ships (6 N. L. R. B. 669), the Union was unable to obtain petitioner's approval of the standard or any other contract (R. 250, 416).

[11] Petitioner's contention that Rosen's union activities were not noteworthy (Brief, pp. 13, 16) is belied by the foregoing facts which more than adequately support the Board's findings that Rosen was "outstanding as an active union leader * * *, and that the ship's officers were aware of his activity" (R. 1765). See also, note 22, p. 20, *infra*.

of the Union, as having been prompted by Buckless' Union membership and activities,[12] and Rosen and another employee, as spokesmen for the crew, immediately protested the dismissal to Mate Tranberg but received no "satisfaction" (R. 258–259, 499).[13] The following morning, petitioner hired one Herman, who was not a member of the Union (R. 861–862).

Later that morning Rosen asked Herman if he held a Union book (R. 260, 864) and he and other members of the crew made plain their resentment at Herman's non-Union status (R. 260–261, 498, 864–865). A little later, Tranberg questioned Herman as to the identity of the member of the crew who had spoken to him about

[12] In its original decision the Board found that Buckless was discriminatorily discharged (R. 101–108). As we have already stated (note 1, p. 2, *supra*), when this case was previously before this Court, the Court denied enforcement to the Board's order as to Buckless, and Buckless' dismissal is not again before the Court.

[13] Rosen testified that Tranberg declared he did not know Buckless had been discharged, and expressed surprise at the news, but "wouldn't give us any satisfaction" (R. 259). The Court's suggestion in its opinion when the case was originally before the Court, that Rosen "proceeded to agitate among the seamen against the captain for his entirely justifiable action [in discharging Buckless]" and that "nothing could be more disruptive of the necessary respect due the captain's proper decision in matters of ship discipline" (R. 1737), is, we respectfully submit, based upon a misapprehension as to the state of the record in this regard. Rosen had in fact quashed a suggestion among the crew that a sit-down strike be conducted against the discharge, and had counselled peaceful access to the Board instead (R. 259–260, 263). He had also deterred members of the crew from protesting the dismissal to the port captain (R. 259). It is thus clear that, far from "agitating" in a manner inconsistent with proper discipline, Rosen had counselled the use of the processes Congress had devised to eliminate industrial strife. In its first decision, the Board agreed with the employees that Buckless' discharge was prompted by his union activities.

the Union (R. 865). Herman declined to divulge this information (*ibid.*), whereupon Tranberg said:

> I know who you had the conversation with. It was Baldy [Rosen's sobriquet]. Baldy is a good man but he let the Union go to his head. We had a boatswain on here [referring to Buckless]; he done the same thing. Every time a [new] man comes on board he asked him if he had a union book (R. 865–866).

Shortly thereafter, Tranberg directed the quartermaster, Hart, to—

> tell these people I don't want none of that kind of stuff here. I am not going to have it. I thought I got rid of that when I got rid of that fellow yesterday [referring to Buckless] (R. 498–499).

That afternoon Tranberg advised Rosen that he was discharged. When Rosen asked for an explanation for the abrupt dismissal, Tranberg answered, "Well, it *might* be [for] the reason that your work is not satisfactory" (italics added) (R. 263).[14] About 9 days later, Tranberg confessed to Herman, that he had—

> fired Baldy on account of union activities but that is not the reason that he gave him, but he also fired the boatswain [Buckless] on account of union activities but the captain found another reason to fire him (R. 866–867).[15]

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[14] In its brief (p. 16), petitioner, carefully deleting the words "might be," characterizes this testimony of Rosen as an "admission" that "Tranberg told him the reason he was 'fired' was because 'your work is not satisfactory.' "

[15] Tranberg also told Herman he was confiding in him because he was not a member of the Union (R. 867).

The foregoing facts, we submit, fully warrant the Board's conclusion that Rosen was dismissed because of his union membership and activities. The explanation which Tranberg equivocally suggested to Rosen *might* be the reason, that his work was not satisfactory, was clearly not the true reason.[16] Indeed, the very fact that Tranberg qualified this explanation by asserting that it *might* be the reason, strongly suggests that it was not, and that it was merely a pretext advanced to conceal an unlawful motive. Tranberg's statement to Herman later that the true reason was Rosen's union activities, corroborates this fair inference. Moreover, it was intrinsically unlikely that Rosen, who had previously had a long and highly creditable record at sea, suddenly became so poor a worker as to warrant his discharge, and, indeed, there was substantial direct evidence to the contrary. Quartermaster Hart, a seaman of over 20 years' experience (R. 500), testified, on the basis of his experience and observation of Rosen on board the *Nevada* at this time, that Rosen was "above the average" as a worker (R. 502). Mate David Rosen

[16] Petitioner also advanced essentially the same reason to the Board and now reasserts it to this Court: it claims that Rosen was discharged because he was lazy and inattentive to duty (Brief, pp. 14–15). Elaborating on this theme at the hearing before the the Board, Captain Swanson testified that Rosen was "purely lazy" (R. 1244–1245) and Mate Tranberg asserted that Rosen absented himself from his watch twice and that while on deck duty he would go aft "to take a smoke every half hour or so" (R. 1150–1152). When it was brought to Tranberg's attention on cross-examination that Rosen did not smoke, Tranberg admitted that this latter accusation was based merely on surmise (R. 1192).

of the *Nevada* reluctantly admitted that Rosen "done his work" (R. 1097).

On the other hand, the entire chain of events culminating in Rosen's discharge strongly suggests, as the Board found, that petitioner dismissed him because it resented his outstanding union activities. These activities had been forcefully brought home to petitioner on the preceding day and on the morning of the discharge, when Rosen protested Buckless' termination and questioned the new employee, Herman, as to his union status. Tranberg's declaration to Quartermaster Hart to the effect that Tranberg did not want "that kind of stuff on here" and that he believed he had "got rid of that when [he] got rid of that fellow [Buckless] yesterday," makes it plain that Tranberg then contemplated further punitive measures against union activities. Tranberg's subsequent remark to Herman that he had discharged Rosen "on account of union activities" confirms the conclusion that Rosen's termination was one of these punitive measures. These facts, considered in conjunction with petitioner's failure to explain the dismissal on any convincing lawful basis, afford more than ample rational basis for the Board's finding of discrimination. *N. L. R. B.* v. *Nevada Consolidated Copper Corp.,* 316 U. S. 105, 106–107; *N. L. R. B.* v *Link-Belt Co.,* 311 U. S. 584, 596–597; *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125, 146; *N. L. R. B.* v. *Weyerhaeuser Timber Co.,* 11 L. R. R. 572, decided December 11, 1942 (C. A. A. 9).

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2. The discharge from the S. S. "Washington"

Following his dismissal from the *Nevada* on April 19, 1938, Rosen was unemployed until June 1, 1938, when he was rehired by petitioner as an able-bodied seaman on the *Washington* (R. 200).[17] Here again Rosen's militant advocacy of the Union and his talent for leadership won recognition from the crew and came prominently to the attention of the ship's officers. Within a few days after he shipped aboard the vessel, Rosen was elected ship's delegate for the unlicensed personnel (R. 275, 285). He revived the institution of union meetings, which had been discontinued (R. 268–269, 415); and as Union representative he presented grievances from time to time to Captain Bergman, who was master of the vessel, and Captain Hand, the port superintendent (R. 275–281, 285–287). Bergman and Hand told Rosen in substance that petitioner did not "recognize any union on this ship," but discussed the grievances with him (R. 276, 295–296). On July 11, 1938, Rosen drafted and signed an open letter from the crew of the *Washington* to the crews of petitioner's other vessels, urging the latter to organize and severely criticizing petitioner for its alleged refusal to ameliorate working

[17] Contrary to petitioner's suggestion (Brief, p. 16), the fact that Rosen was rehired does not subtract from the validity of the Board's finding as to the illegality of petitioner's reason for dismissing him from the *Nevada*. Petitioner's ships operated as separate units in hiring unlicensed personnel (see note 9, p. 9, *supra*). Moreover, as the Board pointed out (R. 1766, note 16), it might equally well be argued that petitioner would not have rehired Rosen if he was in fact negligent and lazy.

conditions on its ships (R. 303–309). Copies of this letter were sent to petitioner's marine general manager, its port superintendent, and other officials (R. 289, 305). On behalf of the crew, Rosen also sent a telegram to the general manager complaining of Bergman's "non-recognition of elected delegates" of the Union on the vessel (R. 289–290).

On July 14, 1938, the *Washington* docked at Port Arthur, and Rosen presented to Captain Hand, who boarded the ship there, a crew grievance relating to overtime pay (R. 293–297). Hand's attitude was openly hostile, but he discussed the matter with Rosen at length, although he refused to recognize Rosen's status as Union delegate (R. 295–297). A little later that afternoon, First Mate Johannesen told Rosen that he was "fired" because "your seamanship is unsatisfactory" (R. 298–299). When Rosen protested and asked for "particular instances" of improper "seamanship," Johannesen declared, "I don't have to give you any reasons for firing you" but admitted, "I haven't got anything against your seamanship" (R. 299). He then told Rosen that alleged slowness at work was responsible for his termination (R. 301).

Petitioner, adhering to substantially the same explanation which it essayed for Rosen's discharge a few months earlier from the *Nevada* (*supra,* pp. 13–14), claimed that Rosen was dismissed from the *Washington* because he was negligent and lazy (Brief, pp. 17–19). But this explanation was no more credible here than it had been in the case of the *Nevada;* there the explanation was advanced merely as a pretext, as the

Board found upon substantial evidence and, indeed, as Mate Tranberg of that vessel admitted (*supra,* p. 13).[18] Moreover, it remained highly improbable that Rosen, who had a record of over 10 years of excellent previous service, suddenly became an incompetent worker, as petitioner would have had the Board believe. And Mate Johannesen's evasiveness in advising Rosen of this allegedly "true" reason for his discharge strongly suggests that it was not *the* reason.

The meritless nature of the defense, as the Board found, is underlined by the unconvincing quality of the testimony of petitioner's witnesses in support of it. Thus, Captain Bergman and Johannesen testified that on various occasions Rosen was negligent and lazy. Bergman's testimony, however, was markedly unspecific; he testified merely that he "watched" Rosen and another seaman from the bridge and "saw that they were men that I would not carry myself if I was the mate on that ship" (R. 1416).[19] And all but one of the instances of Rosen's alleged laziness to which Johannesen testified, occurred during the first of the two voyages on the *Washington* on which Rosen sailed (R. 1541–1544); concerning the second voyage, when, according to Johannesen, Rosen was being given "another chance," there was a paucity of concrete evidence reflecting on Rosen's work: Johannesen merely

[18] "Incompetency" is, of course, a ready elixir to conceal a discriminatory purpose.

[19] The entry in the ship's crew list, stating that Rosen was "discharged for incompetency," having been made by Bergman himself (R. 1396), is obviously a self-serving declaration which is no more persuasive than the latter's testimony.

stated in general and obviously exaggerated terms that Rosen—

> * * * absolutely would do nothing; put him to a job, and he would look around, and wouldn't paint. * * * He would go through the motion. He would sit right there in one place. He wouldn't even stand up; sit down (R. 1544).

In these circumstances the Board properly found, as had the Trial Examiner, who, of course, saw and heard the witnesses testify, that "neither Bergman's nor Johannesen's testimony as to Rosen's negligence and laziness is entitled to credence" (R. 1770).[20]

Upon the foregoing facts the Board's conclusion that Rosen was discharged from the *Washington,* as

[20] On the morning of the day of his discharge, Rosen and another seaman displayed a large sign bearing the letters "C. I. O." over the ship's side, in full view of petitioner's docks (R. 291, 293). In its opinion when this case was originally before this Court, the Court observed that the incident tended to corroborate the testimony of the ship's officers that Rosen was inattentive to duty (R. 1738). The record shows, however, that the sign had been prepared by Rosen on his own time (R. 291). Moreover, petitioner did not claim before the Board that this incident interfered with Rosen's performance of his duties as seaman or was otherwise connected with his dismissal. In view of these facts and those recited in the text, the Board, upon the remand, with full cognizance of the Court's suggestion, nevertheless did not credit the testimony of the ship's officers in this regard. The Board's action may not, of course, be said to be violative of the Court's direction. Plainly, the Court did not intend to substitute its views as to the weight and credibility of evidence for that of the Board. It merely called to the Board's attention, as exclusive trier of the facts, an element in the situation of which, as the Court believed, the Board may not previously have been aware, but it left the ultimate fact-finding decision to the Board, where Congress entrusted it.

he had been from the *Nevada,* because of his union membership and activities, was entirely reasonable. Here, again, petitioner obviously failed to explain Rosen's dismissal on any convincing lawful basis.[21] On the other hand Rosen's outstanding Union activities, petitioner's manifest hostility, Johannesen's evasiveness in acquainting Rosen with the reason for his banishment, and the entire combination of circumstances before the Board, all point to an unlawful basis for the discharge. The Board's finding that this was the true reason thus has ample rational basis in the record.[22] See cases cited *supra,* p. 15.

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[21] Petitioner, for the first time, asserts in its brief (pp. 11–12) that Rosen's display of the sign described above (note 20), was "over the objection of the master and officers" of the ship, constituted a "deliberate attempt" to "ignore the authority of the officers," and was not "conductive" to ship discipline. This contention is demonstrably an afterthought, advanced in a belated effort to conceal petitioner's unlawful purpose by offering still another reason which might have, but obviously did not, prompt petitioner to discharge Rosen. That Rosen's dismissal was not a disciplinary measure provoked by the sign incident is overwhelmingly established by the record. The record conclusively shows that no orders were given countermanding or forbidding the display, and that the ships's officers did not regard the incident as a flouting of their authority or as impairing ship's discipline (R. 291–293, 1571–1572); indeed, Mate Johannesen, who discharged Rosen, testified that he regarded the incident as "child's play" (R. 1571). Moreover, Johannesen did not even mention the incident to Rosen when discharging him, and as we have already indicated (note 20), petitioner did not claim before the Board that the display prompted the discharge; it claimed instead that the discharge was due solely to Rosen's alleged negligence and laziness.

[22] Petitioner's assertions that other members of the *Nevada* and *Washington* crews, not discharged, were as active in union affairs as Rosen and that Rosen and Clarence Buckless admitted this

C. Neither general considerations of safety at sea nor the body of marine safety legislation subtract from the validity of the Board's findings

When this case was previously before this Court, as has been briefly noted above (p. 2), the Court held that the proceeding had been conducted by the Board without proper regard to considerations of safety and discipline at sea and particularly the body of Congressional maritime safety legislation (R. 1726, 1737–1738).[23] Accordingly, the Court remanded the

(Brief, pp. 13, 16; see also pp. 19, 28), are without support in the record. Petitioner's citations to the record on this point disclose other seamen, not discharged, participating in union affairs, but none of comparable stature to Rosen. Moreover, even if petitioner's assertions in this regard were supported and the record showed that petitioner retained other employees who were as active as Rosen, this circumstance, we submit, would not override the cogent evidence that petitioner did in fact discriminate against Rosen. The fact that petitioner may have thought it necessary or desirable to retain other union members throws little, if any, light, we think, on the sole question here: whether the Board's finding that petitioner *did* discharge Rosen because of union membership and activities, is supported by substantial evidence. Cf. *Firth Carpet Co.* v. *N. L. R. B.*, 129 F. (2d) 633, 636 (C. C. A. 2).

[23] This legislation is briefly summarized in the Board's decision as follows (R. 1771, note 18):

"18 U. S. C. A., Sec. 484, Article 293: provides a fine and imprisonment for a member of a crew unlawfully and by force, fraud, or intimidation, to usurp the command of a vessel from its master.

"46 U. S. C. A., Sec. 701, Articles Fifth and Sixth: provide for the punishment of a crew member for continued wilful disobedience or neglect of duty at sea; and for assaulting a master, mate, or other officer.

"46 U. S. C. A., Sec. 239: provides that inspectors shall investigate all acts of misconduct committed by any licensed officer, whose license shall be suspended if the inspectors are satisfied after a hearing that the officer is incompetent or has been guilty of mis-

case to a "reconstructed" Board for a redetermination of the issues in light of these considerations (R. 1738).[24] Thereafter the Board, as appears from the face of its new decision (R. 1771–1776), carefully reconsidered its findings as to petitioner's unfair labor practices in the light of the Court's opinion and "the traditional need for safety and discipline aboard ship" (R. 1771), and explicitly evinced a full awareness of the importance of the maritime safety legislation and the considerations of safety and discipline to which the Court had referred in its opinion (R. 1771, 1774), and its own "task of accommodating the 'scheme' of the [National Labor Relations] Act to 'other and equally important Congressional objectives'" (R. 1771).

Upon such deliberation the Board concluded that "considerations of maritime safety and discipline give no reason for disturbing our findings" as to petitioner's interference, restraint, and coercion, in violation of Section 8 (1) of the Act (R. 1774), or for "alter-[ing] our conclusion that Rosen was discriminatorily discharged," in violation of Section 8 (3) and (1)

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behavior, negligence, or unskilfulness, or has endangered life wilfully.

"46 U. S. C. A., Secs. 226, 228, 229: provide that licenses of captains, mates, and engineers shall be suspended on satisfactory proof of intemperate habits.

"46 U. S. C. A., Sec. 222: requires that a vessel shall only be operated with a full complement of officers and crew, and provides that a captain is liable to fine or penalty for failing to explain to the local inspectors the reason for any deficiency in complement."

[24] One Judge dissented in this regard. See note 1, p. 2, *supra.*

of the Act (1776).[25] We submit that the Board's findings in this regard are entirely warranted by the facts in this case.

The record here makes plain, as the Board found (R. 1775), that there was nothing in Rosen's union activities inconsistent with performance of his duties as a seaman or in anywise violative of law. We have already described these activities, which included general leadership of the crew in routine union matters, instituting and presiding over weekly union meetings held in the crew's quarters, acting as representative of the crew in presenting grievances to the ships' officers and port officials, drafting communications urging the crews of other vessels of petitioner to join the Union and criticizing working conditions and labor policies on petitioner's ships, and protesting to petitioner's general manager the refusal of one of petitioner's captains to recognize union delegates (*supra,* pp. 10–12, 16–17). It is apparent that these are normal and proper activities of employees in the exer-

[25] The Board quite properly did not regard the remand as tantamount to a direction to find that petitioner had not discharged Rosen because of his union activities. Such a construction of the the remand would have rendered the remand vain: the Court had ample power to set aside the Board's order with respect to Rosen, as it had done with respect to Buckless, either for want of evidence or lack of foundation in law. Moreover, the fact that the Court remanded Rosen's case while setting aside that of Buckless is an indication that, in the Court's view, upon reconsideration a conclusion of discrimination as to Rosen might properly be reached by the Board even though a contrary inference could also be drawn, and that the Court desired to leave the ultimate decision for determination by the Board.

cise of their right to self-organization for collective bargaining, guaranteed in the Act. As the Board pointed out (R. 1775), there is no suggestion in the record that these normal and proper activities interfered with Rosen's work, endangered the safety of ships' cargoes, or were detrimental to maintenance of discipline on board these ships, within the meaning of the Congressional maritime safety legislation. (See also, note 21, p. 20, *supra*).

Nor may it reasonably be said that normal and usual union activities, such as those in which Rosen engaged, *per se* create otherwise nonexistent dangers aboard ship and interfere with maintenance of discipline and good order. Were this otherwise doubtful, it would be apparent from the fact that Congress, traditionally mindful, as this Court pointed out when this case was previously before it, of considerations of safety and discipline at sea and the special relations between officers and men aboard ship, included seamen in the coverage of the Act;[26] obviously, if Congress believed that union activities were in and of themselves inconsistent with maritime safety and discipline, it would not have done so. Moreover, in 1938, Congress by amendment to the Merchant Marine Act of 1936 (49 Stat. 1985), expressly announced a policy of encouraging collective bargaining among maritime employees and affirmed the general applicability of the National Labor Relations Act to such

[26] Section 2 (3) of the Act defines employees as "any employee," with certain stated exceptions. Seamen do not appear among the exceptions.

workers.[27] And the National Labor Relations Act proceeds upon the Congressional finding, announced in Section 1 of the Act, that "Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury * * *." Thus, neither the facts in the instant case, nor general experience, nor the body of Congressional legislation support the view that Rosen's union activities endangered maritime safety or subverted discipline.

Indeed, petitioner made no contrary claim to the Board: it insisted throughout the proceedings, and still insists (Brief, pp. 13–20), that Rosen's union activities were entirely unrelated to his discharges, that other seamen were equally active on behalf of the Union, that "there was nothing unusual in Rosen's activities" in this regard, that there "existed no reason why he should have been discharged for such activities and not the other seamen who were also active," and that his dismissals were caused by his alleged laziness and incompetence (R. 299, 1394, 1396). These asserted deficiencies, the Board found upon substantial evidence, had no relation to his discharges (*supra,* pp. 14–15, 17–20). Moreover, as the Board further found, it was not considerations of discipline and safety which prompted petitioner's officials to dismiss Rosen (R. 1775), but resentment at his union

[27] See Section 1002 of the Merchant Marine Act of 1936, which was added in June 1938 by 52 Stat. 965, 46 U. S. C. A., Sec. 1252. This chapter of the Merchant Marine Act expired on June 23, 1942. The Act has consistently been applied by the courts, including the Supreme Court, and the Board to maritime employees.

activity *qua* union activity.[28] These findings are amply supported by substantial evidence; hence, they are, of course, conclusive upon the Court. *N. L. R. B.* v. *Waterman Steamship Corp.,* 309 U. S. 206, 208–209; *N. L. R. B.* v. *Link Belt Co.,* 311 U. S. 584, 597, 601–603.

In short, the situation with which the Board was here presented was not one in which the employer had engaged in interference, restraint, and coercion and had discharged the employee because the employee had engaged in activities, on behalf of union organization or otherwise, which endangered safety or subverted discipline on board ship within the meaning of the federal maritime safety statutes. Nor was it one in which it could be said that the employer had acted in good faith out of consideration for such factors. Rather, it was a situation in which, as the Board found on substantial evidence, the employee had engaged in proper and lawful union activities which in no way interfered with discipline or safety at sea, and the employer had discharged the employee because it resented these union activities *qua* union

[28] We have already discussed (note 21, p. 20, *supra*) petitioner's belated contention in its brief to the Court (p. 12) that Rosen's display of a C. I. O. banner over the side of the *Washington* on the morning of his discharge was a "deliberate attempt" to "ignore the authority" of the ship's officers and was not "conductive to ship discipline." Petitioner further suggests (p. 12) that because the sign display was "an act of sympathy with a strike of the crew of a local ferry" and did not immediately concern the employees of the *Washington*, it "cannot be considered within the scope of legitimate or proper union activities" (*ibid.*). This contention requires no refutation at this stage of the Act's enforcement. In any event, as we have pointed out (note 20), the incident was not claimed to have provoked Rosen's dismissal.

activities. In such circumstances, we submit, it was not only proper but indeed mandatory upon the Board, in the exercise of the responsibilities entrusted to it by Congress, to find that the employer had flagrantly violated the National Labor Relations Act, and to issue an appropriate order in the public interest sought to be effectuated by the Act. Any other holding would read seamen out of the Act's general protection.

The foregoing considerations, we submit, dispose of this case and require enforcement of the Board's findings.[29] However, we think it desirable to discuss

[29] *N. L. R. B.* v. *U. S. Truck Co., Inc.*, 124 F. (2d) 887 (C. C. A. 6), and *Southern Steamship Co.* v. *N. L. R. B.*, 316 U. S. 61, upon which petitioner relies (Brief, pp. 25–26), are plainly inapposite. In the former case the Sixth Circuit denied enforcement to a Board order requiring reinstatement of a truck driver who, as the Board found, had been in fact guilty of drinking while on duty, although the Board also concluded that he had been discharged for discriminatory reasons. The *Southern Steamship* case involved seamen who violated the federal mutiny statutes by engaging in a sit-down strike on board ship, as the Supreme Court held. In the instant case, Rosen engaged in no improper activities on behalf of the Union or otherwise, as we have demonstrated (pp. 23–24).

Petitioner also claims that its conduct did not violate the Act because there is no "evidence" that it in fact discouraged, interfered with, restrained, or coerced employees' union activities (Brief, pp. 27, 28, 36). The coercive effects upon employees of discharges for union activities, and statements, threats, and warnings by the employer against unions, need no elaboration. And it is well settled that the Board need not probe the actual subjective reactions of particular employees. Substantially the same contention as is made by petitioner was made by the employer in *N. L. R. B.* v. *Schaefer-Hitchcock Co.*, 11 L. R. R. 425, decided November 12, 1942, and rejected by this Court without comment. The issue is fully discussed in the Board's reply brief in that case, to which we respectfully refer the Court.

briefly a misconception which appears in petitioner's brief. This is the notion that the Board's decision amounts to a holding that petitioner's officers "should not have discharged" Rosen but should have "permitted him to remain aboard their vessels despite their better judgment" (Brief, pp. 22–24, 27).[30]

Of course, the question before the Board was not—it could not be—whether petitioner should have or lawfully could have discharged Rosen because he had engaged in misconduct or was inefficient, or whether petitioner should or must retain him. Petitioner was and is free to discharge him for *any* reason or *no* reason, so long as it is not for the reason forbidden by the Act; i. e., lawful union activities. *Associated Press* v. *N. L. R. B.*, 301 U. S. 103, 132. The Board may not and does not lay down rules as to what conduct gives an employer license to dismiss an employee, or whether the employer should have done so in particular circumstances. Such an approach would indeed constitute a usurpation of the employer's right to select his own staff. The Board's only inquiry is and can be whether the employer *in fact* discharged the employee for protected union activities.[31]

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[30] Petitioner's argument assumes, of course, that this "better judgment" was not influenced by Rosen's union activities.

[31] While, in fashioning its order, the Board is required to accommodate the purposes of the Act to "other and equally important" public objectives, this problem arises only after the factual inquiry of motive has been resolved. See, *Southern Steamship Co.* v. *N. L. R. B.*, 316 U. S. 31, 47; *N. L. R. B.* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240; Note, *Employee Misconduct under the Wagner Act: Developments since the Fansteel Case*, 39

In the instant case, the Board's findings properly resolved this factual issue of motive against petitioner. This does not amount to a Board judgment that petitioner should not have or may not discharge Rosen for any or no reason—except the proscribed reason. Petitioner is still free to manage its own business and select its own staff within the proper limits permitted by law. But petitioner may not conceal an unlawful purpose behind pious protestations that proper cause existed which *might* have—but did not—prompt its conduct. Nor, of course, may it shield its unlawful conduct behind assertions of existence of lawful cause which did not in fact exist.

Point II

The Board's order is valid and proper under the Act

The Board's order is in the usual and judicially approved form upon the findings made: it requires petitioner to cease and desist from the unfair labor practices found, to reinstate Rosen with back pay,[32] and to post appropriate notices in conspicuous places

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Columbia Law Review 1369; cf. *Phelps Dodge Corp.* v. *N. L. R. B.*, 313 U. S. 177, 193–194. In resolving the issue of motive, the Board frequently considers whether lawful reasons for the discharge which may be advanced by the employer exist, and whether the asserted cause is trivial or serious. But this is solely in order to secure light on the factual question of motive, and is always secondary to that question.

[32] The requirement that back pay include the reasonable value of Rosen's maintenance on board ship as part of his compensation is entirely proper, as petitioner does not deny. See *N. L. R. B.* v. *Waterman Steamship Corp.*, 309 U. S. 206.

on its docks and vessels (R. 1779–1781). Petitioner does not contend that the order is improper upon the findings, except that it asserts that the cease-and-desist provisions of the order, quoted in the footnote,[33] are too broad in view of *N. L. R. B.* v. *Express Publishing Co.,* 312 U. S. 426 (Brief, pp. 38–40), and that the posting of notices should be confined to the particular vessels of petitioner involved in the unfair labor practices found to have been committed (Brief, pp. 40–41). Neither objection to the order, we submit, has merit.

The Board's findings reveal that petitioner here engaged in varying acts of interference, restraint, and coercion directly violative of Section 8 (1) of the Act, and in discriminatory discharges violative of Section 8 (3). These are precisely the unfair labor practices from which petitioner is directed to cease and desist. Such provisions of Board orders were recently enforced by this Court upon similar

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[33] Cease and desist from—

"(a) Discouraging membership in National Maritime Union of America, Port Arthur Branch, or any other labor organization of its employees by discharging or refusing to reinstate any of its employees, or *in any other manner* discriminating in regard to their hire and tenure of employment, or any terms or conditions of their employment, because of membership or activity in any such labor organization;

"(b) *In any other manner* interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, as guaranteed by Section 7 of the Act. [Italics added.]

findings in *N. L. R. B.* v. *Schaefer-Hitchcock Co.*, 11 L. R. R. 425, decided November 12, 1942; *N. L. R. B.* v. *Weyerhaeuser Timber Co.*, 116 R. R. 572, decided December 11, 1942; and by the Supreme Court in *N. L. R. B.* v. *Nevada Consolidated Copper Corp.*, 316 U. S. 105, enforcing 26 N. L. R. B. 1182, 1235; *N. L. R. B.* v. *Electric Vacuum Cleaner Co.*, 315 U. S. 685, enforcing 18 N. L. R. B. 591, 640. See also *N. L. R. B.* v. *Hollywood-Maxwell Co.*, 126 F. (2d) 815, 818 (C. C. A. 9).

The provision of the Board's order requiring posting and maintenance of appropriate notices on all of petitioner's docks and vessels (R. 1780–1781), is also a proper exercise of the Board's "informed discretion" in determining measures necessary to expunge the effects of petitioner's unfair labor practices. *Phelps-Dodge Corp.* v. *N. L. R. B.*, 313 U. S. 177, 195; *International Association of Machinists* v. *N. L. R. B.*, 311 U. S. 72, 82. Identical provisions have been enforced by the Supreme Court in other cases involving maritime employers. E. g., *N. L. R. B.* v. *Waterman Steamship Corp.*, 309 U. S. 206, enforcing 7 N. L. R. B. 237, 253; *Southern Steamship Co.* v. *N. L. R. B.*, 316 U. S. 31, 49, enforcing in pertinent part 23 N. L. R. B. 26, 48 (par. "g"). See, also, *Black Diamond S. S. Corp.* v. *N. L. R. B.*, 94 F. (2d) 875 (C. A. A. 2), cert. denied 304 U. S. 579, enforcing 3 N. L. R. B. 84, 96; *South Atlantic Steamship Co.* v. *N. L. R. B.*, 116 F. (2d) 480 (C. C. A. 5), cert. denied 313 U. S. 582, enforcing 12 N. L. R. B. 1367, 1383. Petitioner cites no decisions to the contrary.

CONCLUSION

It is respectfully submitted that the Board's findings are supported by substantial evidence, that its order is valid and proper, and that a decree should issue denying the petition to review and set aside the Board's order, and granting enforcement of the order in full.

ROBERT B. WATTS,
General Counsel,
ERNEST A. GROSS,
Associate General Counsel,
HOWARD LICHTENSTEIN,
Assistant General Counsel,
DAVID FINDLING,
MALCOLM A. HOFFMANN,
Attorneys,
National Labor Relations Board.

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APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449; 29 U. S. C., Supp. V., Sec. 151 *et seq.*) are as follows:

SEC. 2. When used in this Act—

(3) The term "employee" shall include any employee, * * * but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse.

* * * * *

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

* * * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. * * *

* * * * *

SEC. 10 (e) * * * No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objec-

tion shall be excused because of extraordinary circumstances. * * *

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business. * * * Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), * * * and the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive.

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